

ENDORSED
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In the office of the Secretary of State
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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

At 4:30 o'clock P. M.
MARCH FONG EU, Secretary of State

In re:)	1986 OAL Determination No. 4
Request for Regulatory)	
Determination filed by)	[Docket No. 85-005]
the California Taxpayers')	
Association, concerning)	June 25, 1986
County Assessors Letter)	
No. 82/89 ("Easements of)	Determination Pursuant to
Intercounty Pipelines"))	Government Code section
issued by the State Board)	11347.5; Title 1, California
of Equalization / <u>1</u>)	Administrative Code, Chapter
)	1, Article 2

Determination by: LINDA STOCKDALE BREWER, Director

Herbert F. Bolz
Coordinating Attorney,
Rulemaking and Regulatory
Determinations Division

THE ISSUE PRESENTED /2

The California Taxpayers' Association ("Cal-Tax") has requested the Office of Administrative Law ("OAL") to determine whether or not County Assessors Letter No. 82/89 ("Easements of Intercounty Pipelines") issued by the State Board of Equalization ("Board") is a "regulation" as defined in Government Code section 11342(b) and is therefore invalid unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act ("APA"). /3

THE DECISION /4, 5, 6

The Office of Administrative Law finds that the above noted Letter (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

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The Office of Administrative Law finds that the above noted Letter (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

I. AGENCY AND AUTHORITY

The State Board of Equalization (hereinafter, "the Board") was created by former article 13, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in California Constitution, article 13, section 17. The Board is, among other things, charged with administering key features of property tax collection.

Government Code section 15606(b) expressly grants rulemaking power to the Board:

"The State Board of Equalization shall do all of the following:

- (a) Prescribe rules for its own government and for the transaction of its business.

* * *

- (c) Prescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing, including uniform procedures for the consideration and adoption of written findings of fact by local boards of equalization as required by section 1611.5 of the Revenue and Taxation Code.
- (d) Prescribe and enforce the use of all forms for the assessment of property for taxation, including forms to be used for the application for reduction in assessment.
- (e) Prepare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation. It may adapt the instructions to varying local circumstances and to differences in the character and conditions of property subject to taxation as in its judgment is necessary to attain this uniformity.
- (f) Subdivisions (c), (d) and (e) shall include, but are not limited to, rules, regulations, instructions and forms relating to classifications of kinds of property and evaluation procedures.

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* * *

This section is mandatory." (Emphasis added.)

The final sentence of section 15606 makes clear that the Board must "prescribe rules and regulations to govern ...assessors when assessing...."

Property assessment responsibilities are divided between the Board and local county assessors. The Board is required to "annually assess pipelines, flumes, canals, ditches and aqueducts lying within two or more counties." Cal. Const. art. 13, sec. 19 (hereinafter, "section 19".) (Emphasis added.) Revenue and Taxation Code section 721 provides that:

"The Board shall annually value and assess all of the taxable property within the state that is to be assessed by it pursuant to section 19 of Article XIII of the Constitution and any legislative authorization thereunder." (Emphasis added.)

Revenue & Taxation Code section 405 provides in part that:

"(a) Annually, the [county] assessor shall assess all the taxable property in his county, except state-assessed property...." (Emphasis added.)

In July, 1982, the Board of Equalization issued Letter to Assessors No. 82/89 (attached as Appendix A), which in substance reinterpreted the California Constitutional term "pipelines" to include not only the pipe and associated equipment--which had been the Board's interpretation since 1936 --but also land or easements. The effect of this action was to shift the responsibility for assessing pipeline-related land or easements away from the county assessors to the Board. Since 1936, land or easements associated with pipelines extending to more than one county had been assessed by counties. By thus creating a new category of state-assessed property, the Board rendered inapplicable the rules governing county assessed property./7 State-assessed property is valued annually, while county-assessed property is valued at its 1975-1976 assessment level unless construction or change of ownership occurs./8 The values determined in the annual state assessment are allocated among the various counties in which the properties are located.

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II. OVERVIEW OF PRELIMINARY ISSUES DECIDED

The Board's contention that OAL should not entertain the instant Request for Determination raises the following issues:

WHETHER CAL-TAX HAS STANDING TO MAKE THIS REQUEST SINCE THAT ORGANIZATION IS NOT DIRECTLY AFFECTED BY THE CHALLENGED RULE.

WHETHER OAL IS PRECLUDED FROM RULING ON THE VALIDITY OF THE CHALLENGED LETTER, WHILE THE ISSUE OF WHETHER THE BOARD IS MANDATED BY THE CONSTITUTION TO ASSESS PIPELINE LAND AND EASEMENTS IS STILL BEFORE THE CALIFORNIA SUPREME COURT.

WHETHER AN OAL DETERMINATION ADVERSE TO THE BOARD WOULD VIOLATE THE POLICY UNDERLYING CALIFORNIA CONSTITUTION, ARTICLE 13, SECTION 32, WHICH LIMITS JUDICIAL REVIEW OF STATE TAX PROCEEDINGS TO TAX REFUND ACTIONS.

Conclusions

We conclude that there are no limitations on who may file a request for determination; that there is no requirement that the requestor be directly affected.

We conclude that OAL is not precluded from ruling on the validity of the challenged Letter simply because a related issue is pending before the state Supreme Court.

We conclude that an OAL ruling on the validity of the challenged Letter not only does not violate California Constitution, article 13, section 32, but is in fact required by other provisions of law.

III. OVERVIEW OF DISPOSITIVE ISSUES DECIDED

The Cal-Tax request raises the following issues:

WHETHER ISSUANCE OF THE CHALLENGED LETTER WAS AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE BOARD.

WHETHER THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE APA.

WHETHER THE CHALLENGED LETTER IS A "REGULATION" AS THAT TERM IS BASICALLY DEFINED IN THE APA.

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WHETHER THE CHALLENGED LETTER FALLS WITHIN ANY RECOGNIZED EXCEPTION TO THE APA.

Conclusions

We conclude that:

The Board exercised its quasi-legislative power by issuing the Letter; it was not a quasi-judicial determination.

The Board's quasi-legislative enactments are generally subject to the APA.

The Letter is a "regulation" as that term is basically defined in the APA.

The Letter does not fall within the "rulings of counsel" or any other recognized exception to the APA; there is no "Letter to Assessors" exception to APA requirements.

IV. DISCUSSION OF PRELIMINARY ISSUES

WHETHER CAL-TAX HAS STANDING TO MAKE THIS REQUEST SINCE THAT ORGANIZATION IS NOT DIRECTLY AFFECTED BY THE CHALLENGED RULE.

We conclude that there are no limitations on who may file a request for determination; that there is no requirement that the requestor be directly affected./9

WHETHER OAL IS PRECLUDED FROM RULING ON THE VALIDITY OF THE CHALLENGED LETTER, WHILE THE ISSUE OF WHETHER THE BOARD IS MANDATED BY THE CONSTITUTION TO ASSESS PIPELINE LAND AND EASEMENTS IS STILL BEFORE THE CALIFORNIA SUPREME COURT.

In its reply to the Cal-Tax request, the Board asserts:

"For all practical purposes, the Office of Administrative Law is now being asked to decide the same issue which is before the California Supreme Court. If the Supreme Court determines, as did the court below, the Board is without jurisdiction to assess pipeline land and rights of way, any decision by the Office of Administrative Law on the regulation issue will be moot. Acting on the court's decision, the Board will order

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that such properties be removed from the state-assessed roll and county assessors will be notified that the land and rights of way are subject to local assessment. Thus, such a decision would accomplish the end sought by Cal-Tax when it made its Request for Determination." (Emphasis added.)/10

We reject this contention, since as discussed below, the issue before OAL is not whether the Board has jurisdiction to assess pipeline land and rights of way, but whether the challenged Letter to Assessors is an "underground regulation."

The Board next contends:

"Conversely, any decision by the Office of Administrative Law would also be ineffective in the face of a decision by the Supreme Court sustaining the position of the Board that section 19 of Article XIII California Constitution requires the state assessment of the land and associated rights of way of intercounty pipelines. Section 19 is a self-executing provision which does not require implementing provisions, either in the form of statutes or in the form of regulations. The constitutional duty of the Board to assess pipelines was clearly recognized in General Pipe Line Co. of California v. State Board of Equalization (1936) 5 Cal.2d 253. Since the requirement that the Board assess pipelines flows from the Constitution, neither the Legislature nor the Office of Administrative Law can impair the Board's authority to perform that duty."/11

We also reject this contention, as further discussed below.

In addition, in light of the Board's request to the Court that it avoid the question of the Board's authority to assess pipeline real property interests, it is clear that OAL's determination in this matter will not necessarily be ineffective. And, even if the Board were correct on this point, OAL's continued consideration of this matter (a) is required by law /12 and (b) serves the fundamental values of meaningful public participation in rulemaking /13 and effective judicial review of administrative policies. Codifying the California Supreme Court decision in Armistead v. State Personnel Board,/14 the Legislature enacted Government Code section 11347.5. OAL then adopted procedural regulations

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implementing section 11347.5. OAL is conducting the regulatory determination process mindful of the primary goals of the APA -- meaningful public participation and effective judicial review./15_ OAL believes that it is never a waste of time for a governmental agency to respond to a legitimate public concern.

If the Board had elected in 1982 to propose a regulation incorporating its reinterpretation of "pipeline", rather than resorting to the approach here at issue, significant economies could have been achieved. With a limited investment of time and money, affected members of the public would have been able to comment upon and shape the proposed rule. It would not have been necessary to incur the significant costs of litigation. OAL would have reviewed any legal challenges contained in public comments.

If a regulation had been proposed in 1982, the Board would have been able to systematically spell out its legal and policy justifications in the rulemaking file. We note that lengthy policy discussions are contained in the Board's Supreme Court briefs. Such discussions seem more appropriately placed in rulemaking file documents such as the statement of reasons.

Is the issue of whether the challenged Letter is an underground regulation currently before the California Supreme Court?

In analyzing the above contention, we have reviewed the briefs submitted in the case cited by the Board -- Western Oil and Gas Association v. California State Board of Equalization (Supreme Court No. LA 32140). This review made clear that the issue of whether the Board's Letter to Assessors reinterpreting the term "pipelines" is a "regulation" as defined in the APA has not been raised by the parties and is not before the court.

Before discussing the issues that are before the Supreme Court, it is helpful to review the litigation history of the term "pipelines" (Cal. Const., art. 13, section 19).

In 1934, the Board first sought to exercise its newly-conferred authority to assess intercounty "pipelines" in accord with a recently adopted amendment to the California Constitution. At that time, the Board determined that its authority over pipelines encompassed not only (1) the pipe

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itself, but also (2) the associated structures and mechanical equipment, and (3) the land or easements. In 1935, a pipeline owner won a court order holding, among other things, that "pipelines" meant only the pipe itself. On appeal to the California Supreme Court, the Board dropped the land or easement issue and argued only that "pipelines" meant both the pipe itself and the associated equipment. In 1936, the California Supreme Court held for the Board, ruling that "pipelines" included associated equipment as well./16 For 46 years, the Board made no further attempt to assess pipeline land or easements, leaving this function to county assessors. In 1982, however, the Board -- without first seeking popular, legislative, or judicial approval -- revived its 1935 claim that "pipelines" included both land and easements.

When the Board attempted to assert this newly defined assessing authority by requiring pipeline owners to produce maps and other papers to aid in the assessment process, some of these owners obtained a court order which prohibited the Board from requiring production of such information. The court order was based on the conclusion that the Board had no legitimate need for the data in light of the fact that it totally lacked power to assess pipeline land or easements. After the Board lost its appeal to the California Court of Appeal,/17 it was granted a hearing in the California Supreme Court,/18 where a decision is currently pending. It is worthy of note that the Board has urged the state's high court to ignore the constitutional interpretation question of whether "pipelines" includes land or easements, even though this is the only forum in the state where such an issue can be finally decided. Rather, the Board argues strongly in briefs filed in this latter proceeding that the pipeline owners should be strictly limited to challenging the Board's assessment authority by filing a refund action.

The outcome of the Court's decision in the above action will not, in any event, be dispositive of the issue now before OAL, however. The fundamental issue before the Court goes strictly to the extent of the Board's jurisdiction. The basic issue before OAL is whether the state agency can exercise its authority over county tax assessors by informal procedures.

In resolving this basic issue, the critical inquiry is whether or not "pipelines" as used in the Constitution has more than one legally tenable interpretation.

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If "pipelines" may only be read one way--as including land or easements -- then the Board is correct in stating that it would simply be applying a self-executing constitutional provision.

If, however, "pipelines" may plausibly be read as either including or not including land or easements, then the Board's expansive interpretation is an "underground regulation." /19_ Since the issue of whether the Board has jurisdiction to assess pipeline land and easements is not before us, we look only to whether, if the Board did have such jurisdiction, it would require a formally adopted regulation to exercise it. /20

Agencies implementing constitutional provisions are bound by the APA just as agencies implementing statutes or regulations; section 19 is not self-executing.

In support of this conclusion, we cite Government Code section 11342(b) which defines "regulation" in part as:

"every rule...adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it...." (Emphasis added.)

The question here is whether the term "the law" includes constitutional as well as statutory provisions. The term "law" is not defined in the APA. Other statutory provisions, however, make clear that the term includes the state Constitution. /21_

Civil Code section 22 defines "law" as the "solemn expression of the will of the supreme power of the State." Civil Code section 22.1 continues:

"the will of the supreme power is expressed

(a) By the Constitution.

(b) By statutes." (Emphasis added.)

Code of Civil Procedure section 1897 provides in part:

"The written law of this state is...contained in its Constitution and statutes...." (Emphasis added.)

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Evidence Code section 451 provides in part:

"Judicial notice shall be taken of the following:

- (a) the decisional, constitutional, and public statutory law of this state...." (Emphasis added.)

Therefore, for purposes of regulatory determination analysis, the "law" to be enforced or administered includes not only statutory, but also the decisional and constitutional provisions of law.

The Board impliedly acknowledges this principle in that it has in the past adopted regulations implementing constitutional provisions, including Title 18, CAC, sections 4 and 460 (along with a statute) as well as 461 and 468 (implementing only a constitutional provision). OAL has also adopted a regulation implementing California Constitution, article 3, section 3.5: Title 1 CAC section 14 (c)(2).

In enacting Government Code section 11347.5, the Legislature was certainly aware that the Board was responsible under California Constitution, article 13, section 19 for assessing pipelines. In 1976, the Legislature had added section 721 to the Revenue and Taxation Code, directing that:

"The Board shall annually value and assess all of the taxable property within the state that is to be assessed by it pursuant to section 19 of Article XIII of the Constitution and any legislative authorization thereunder." (Emphasis added.)

The Legislature nonetheless did not exclude the Board's pipeline assessment activities from Government Code section 11347.5, electing instead to state unequivocally that:

"No state agency shall issue any...instruction which is a regulation defined in subdivision (b) of section 11342 unless [it has been adopted pursuant to the APA]." (Emphasis added.)

The Board contends that section 19 is a self-executing provision, requiring neither statutes nor regulations for implementation. According to the APA, one of the purposes of regulations is to "interpret[], or make[] specific" statutes,

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court decisions, or other provisions of law. /22_ In the instant case, the provision of law establishing the Board's authority to assess "pipelines" can be interpreted in more than one way. The Board itself has interpreted this term in at least two different ways. Shortly after the term was added to the Constitution, a California trial court read it yet a third way. /23

WOULD AN OAL DETERMINATION ADVERSE TO THE BOARD VIOLATE THE POLICY UNDERLYING CALIFORNIA CONSTITUTION, ARTICLE 13, SEC. 32, WHICH LIMITS JUDICIAL REVIEW OF THE STATE TAX PROCEEDING TO TAX REFUND ACTIONS.

The Board's third ground for requesting OAL's "withdrawal" is that an OAL determination adverse to the Board would violate the policy underlying California Constitution, article 13, section 32, which limits judicial review of state tax proceedings to tax refund actions.

Section 32 of article 13 of the California Constitution states in part:

"No legal or equitable process shall issue in any proceeding in any court against this state or any officer thereof to present or enjoin the collection of any tax. After payment of a tax claimed to be illegal an action may be maintained to recover the tax paid with interest, in such manner as may be provided by the Legislature." (Emphasis added.)

We reject the above argument. OAL is not a court. Thus, the quoted constitutional provision does not apply by its terms. Applicable law (found in the Government Code and Title 1 of the California Administrative Code) does, however, require OAL to issue determinations if certain requirements are met.

Further, if all tax-related policies were deemed to be immune from review under Government Code section 11347.5, this would effectively exempt the Board from that statute despite the statute's all inclusive language:

"No state agency shall issue ...any guideline...which is a regulation [as defined in the APA]...." (Emphasis added.)

For the reasons stated above, we must deny the Board's request to withdraw from consideration of the instant Request for Determination.

V. DISCUSSION OF DISPOSITIVE ISSUES

There are four main issues before us: /24

- (1) WHETHER THE ISSUANCE OF THE INFORMAL RULE CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE ISSUING AGENCY.
- (2) WHETHER SUCH INFORMAL RULES ARE GENERALLY SUBJECT TO THE REQUIREMENTS OF THE APA.
- (3) WHETHER THE INFORMAL RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (4) WHETHER THE INFORMAL RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE "RULE" IS A RESULT OF THE EXERCISE OF THE BOARD'S QUASI-LEGISLATIVE POWERS. /25

A quasi-legislative rule is one formulating a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case. /26

If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable "interpretation", that rule is not quasi-legislative in nature -- no new "law" is thereby created. As discussed above in Part IV, the term "pipelines" as used in California Constitution, article 13, section 19, has more than one possible interpretation. Thus, the challenged Letter is not simply an administrative application of an existing legal requirement.

Is the challenged Letter a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case?

We conclude, for the following reasons, that the answer to this question is "yes":

- (1) Under the Letter, jurisdiction to assess land and right-of-way easements associated with intercounty pipelines will henceforth be transferred from county to state officials;

- (2) Pipeline companies will be required to file with the state "land identification maps for all land parcels and rights-of-way being used in the pipeline function under the Board's jurisdiction."

The Board argues that its decision to reinterpret "pipelines" was "quasi-judicial" in nature -- as opposed to a legislative-type conclusion which could constitute a "regulation." The Board contends that in so reinterpreting "pipelines" it was merely "pass[ing] on its own jurisdiction in the first instance", thus performing an adjudicative function -- just as a court determining an issue of law is engaged in adjudication. /27

We reject this argument for the following reasons:

- (1) Issuance of the Letter was not an adjudicative act: there was no controversy involving the rights of named parties./28 For what may well be excellent policy and fiscal reasons, the Board determined in the abstract that it would be advisable to reinterpret "pipeline" and then notified all concerned of this decision -- obviously intending that local assessors and pipeline companies comply.
- (2) As evidenced by Government Code section 15606 (See Part I), the Legislature views rules governing "assessors when assessing" as quasi-legislative in nature.

SECOND, WE INQUIRE WHETHER THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS ARE GENERALLY SUBJECT TO THE APA.

The APA applies to all state agencies, except those "in the judicial or legislative department." /29 Since the Board is neither in the judicial nor legislative "department," there can be no doubt that APA rulemaking requirements generally apply to the Board. /30

THIRD, WE INQUIRE WHETHER THE INFORMAL RULE UNDER REVIEW IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(b) defines "regulation" as:

"...every rule, regulation, order, or standard of general application or the amendment, supplement or

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revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure...."
(Emphasis added.)

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations", provides in part:

"No state agency shall issue...any guideline, criterion, bulletin [or] instruction...which is a regulation as defined in subdivision (b) of section 11342, unless the...guideline, criterion, bulletin [or] instruction...has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."
(Emphasis added.)

Applying the definition found in Government Code section 11342(b) involves a two-part inquiry:

- (a) is the informal rule either (i) a rule or order of general application or (ii) a modification or supplement to such a rule?
- (b) does the rule being enforced either (i) implement, interpret or make specific the law enforced or administered by the Board or (ii) govern the Board's procedure?

The answer to both parts of this inquiry is "yes".

First, the challenged Letter is clearly a standard of general application. The rule stated applies on a statewide basis to two classes of persons, county assessors and pipeline owners.

Second, by redefining "pipelines" to encompass real property interests, the Board has interpreted at least two -- possibly three -- provisions of law administered by the Board.

As discussed above in Part IV, the Board has clearly reinterpreted the term "pipelines" as found in California Constitution, article 13, section 19. Further, the Board has, in effect, reinterpreted terms appearing in two statutes.

Revenue and Taxation Code section 721 provides in part that:

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"The Board shall annually value and assess all of the taxable property within the state that is to be assessed by it pursuant to section 19 of Article XIII...."
(Emphasis added.)

Before the challenged Letter was sent, the Board had interpreted the term "property...to be assessed...pursuant to section 19" to include pipeline pipes and associated equipment, but not land or easements. In the challenged Letter, the Board reinterpreted "property...to be assessed...pursuant to section 19" to include not only pipeline pipes and equipment but also land and easements.

Also, Revenue and Taxation Code section 405 provides in part that:

"(a) Annually, the [county] assessor shall assess all the taxable property in his county, except state-assessed property, to the persons owning, claiming, possessing or controlling it on the lien date."
(Emphasis added.)

As the Board recognizes "...assessors need to know what property will be state assessed when preparing the local property tax roll." (Emphasis added.) /31 The Board itself states that the Letter was:

"a means of informing county assessors of the fact [sic] that the Board had determined that pipelines and rights-of-way should be state assessed. Presumably, assessors complied with the law [i.e., the Board's expansive reinterpretation of the statutory term "state assessed property"] and, where necessary, made the appropriate adjustments to the local roll required by section 405. If they failed to do so, the taxpayer was provided an adequate remedy through the local equalization process." (Emphasis added.)/32

Our conclusion that the challenged Letter is a "regulation" is supported by Goleta Valley Community Hospital v. State Department of Health Services. /33 In Goleta Valley, the state agency sent a letter adopting one interpretation of an ambiguous regulation. Later, the agency sent a second letter interpreting the regulation in a different way. Citing Armistead, the Goleta Valley court declared the reinterpretation invalid. The court stated:

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"Defendant [agency] contends its interpretation that interim rate reductions based on Title 22, California Administrative Code section 51537 are nonappealable is procedurally valid and constitutes a permissible departure from an earlier interpretation. While we agree with the latter contention, we cannot agree with the former.

As noted in Weiss v. State Board of Equalization (1953) 40 Cal.2d 772, 776-777, 256 P.2d 1: 'Like courts, agencies may overrule prior decision or practices and may initiate new policy or law through adjudication.... [D]eliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable.' However, the power to overrule an earlier interpretation of an agency's regulations does not necessarily render the act of reinterpretation procedurally valid.

Administrative agency rulemaking is governed by the California Administrative Procedure Act, chapter 3.5 (Gov. Code, sections 11340-11356). Government Code section 11342, subdivision (b), defines 'regulation' as follows: '"regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency.' Accordingly, a written interpretation of a rule or regulation which concerns a matter of import generally to those dealing with the interpreting agency cannot escape scrutiny on the ground it does not more than govern the agency's internal affairs. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203, 149 Cal.Rptr. 1, 583 P.2d 744.)

Government Code section 11347.5 provides in pertinent part: 'No state agency shall issue, utilize, enforce, or attempt to enforce any...regulation...unless [it]...has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.' Any 'regulation' promulgated contrary to the provisions of chapter 3.5 of the Administrative Procedures Act is invalid. (Armistead v. State Personnel Board, supra, 22 Cal.3d 198, 201 149 Cal.Rptr. 1, 583 P.2d 744.) It is

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undisputed that the written interpretation at issue herein was undertaken without any attempt at complying with the applicable Government Code provisions. Hence, the letter of January 15, 1982, interpreting the appeals provisions of the California Administrative Code, title 22 as inapplicable to interim payment rate reductions is procedurally invalid. Moreover, due to its invalidity, it merits no weight as an agency interpretation of a regulation (Id., at p. 205, 149 Cal.Rptr. 1, 583 P.2d 744.)" (Emphasis added.) /34

Like the agency in Goleta Valley, the Board sent a letter re-interpreting an ambiguous provision of law. Like the agency in Goleta Valley, the Board made no attempt to comply with APA requirements in issuing the second interpretation. And, like the Goleta Valley letter, the challenged Board Letter cannot withstand scrutiny under Government Code section 11347.5. /35

We conclude therefore that (1) the issuance of the above noted Letter constitutes an exercise of quasi-legislative power by the Board; (2) quasi-legislative acts of the Board are generally subject to the requirements of the Administrative Procedure Act; and (3) the Letter is a "regulation" within the meaning of Government Code section 11342(b).

FOURTH, WE INQUIRE WHETHER THE BOARD'S LETTER FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION.

Rules concerning certain activities of state agencies are not subject to the requirements of the APA. /36

The APA Exception for Rulings of Counsel -- Government Code section 11342(b)

Government Code section 11342(b) provides in part that:

"'Regulation' does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization...." (Emphasis added.)

Though the Board has not raised this issue, we have reviewed the challenged Letter in light of our earlier construction of the above noted statutory exemption. /37 As discussed in our earlier opinion, to be considered a "ruling of counsel", a challenged document must satisfy each element of a four-part

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test. /38 The Letter currently under review meets none of these four criteria. Thus, it does not fall within the "rulings of counsel" exception.

The Purported APA Exception for Instructions to Assessors
--Government Code section 15606(e)

The Board argues that the challenged Letter "merely informs assessors of the Board's conclusion that pipeline land and rights-of-way should be state assessed and of its order to the Board staff to carry out this conclusion." (Emphasis added.) /39 This argument also implicitly raises the question of whether Government Code section 15606(e) creates an exception to APA requirements. Section 15606(e) -- quoted in full above in Part I -- states that the Board shall prepare and issue instructions to assessors designed to promote assessment uniformity.

We reject the general contention that the challenged Letter is not covered by the APA because it is merely "informational" in nature. It is generally inconsistent with Government Code section 11347.5 for agencies to "inform" the public via documents such as Letters to Assessors of interpretations or reinterpretations of the law administered by the agency. /40

Such interpretations must generally be brought to the attention of the public by publication in the California Administrative Code, following notice, public comment and review by OAL. Further, the Board's comments (quoted in Part V (3)) reveal that local assessors were expected to comply with "the law" by promptly implementing the Board's reinterpretation of the legal terms "pipelines" and "state assessed property."

The second facet of the Board's argument concerns the alleged APA exception created by Government Code section 15606(e).

We note that Government Code section 11347.5 specifically states that "no state agency shall issue...any... instruction...which is a regulation [as defined in the APA]." (Emphasis added.)

Read together with Government Code section 15606(e), /41 it would appear that Government Code section 11347.5 precludes the Board from evading APA requirements by the simple expedient of labelling informal rules "instructions." Read

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together, the two statutes indicate that "instructions" are permissible so long as they are not regulatory in content.

In 1983, the Legislature elected to exempt "legal rulings of counsel" from APA requirements. /42 Had the Legislature intended to exempt "instructions to assessors" (also known as "Letters to Assessors") as well it could have done so.

We conclude, therefore, that none of the available statutory or judicial exceptions apply to the challenged Letter.

VI. CONCLUSION

For the reasons set forth above, OAL finds that the above noted Letter is (1) subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

506/EQ.1-EQ.12



STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA

(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95803)

(916) 322-2323

July 15, 1982

GEORGE R. REILLY

First District, San Francisco

ERNEST J. DROMENBURG, JR.

Second District, San Diego

WILLIAM M. BENNETT

Third District, San Rafael

RICHARD MEYERS

Fourth District, Pasadena

KENNETH CORT

Controller, Sacramento

DOUGLAS D. BELL

Executive Secretary

No. 82/89

ALL COUNTY ASSESSORS

EASEMENTS OF INTERCOUNTY PIPELINES

On May 20, 1982, the Board of Equalization, acting upon advice of counsel, concluded that it has assessment jurisdiction over the land and right-of-way easements of intercounty pipelines and ordered that these land parcels and land rights will be included on the 1984 Board of Equalization Roll of state-assessed property.

To accomplish this task, we will require companies to file land identification maps for all land parcels and rights-of-way being used in the pipeline function under the Board's jurisdiction. These filings must be made well in advance of the 1984 lien date.

Proposed forms and instructions to be used to implement the Board's directive will be sent to you around August 15, 1982. Your suggestions and recommendations will be solicited before the final procedures are adopted.

Sincerely,

Louis E. Mayer, Chief
VALUATION DIVISION

LEM:hb

NOTES

1. In this proceeding, the California Taxpayers' Association was represented by John H. Sullivan. The Board was represented by Executive Secretary Douglas D. Bell.
2. The legal background of the regulatory determination process--including a detailed survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (State Board of Chiropractic Examiners, April 9, 1986; Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; looseleaf typewritten version, notes pp. 1-4.
3. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, do not concern rulemaking.
4. One timely comment was received and considered. In this comment, Chevron USA Inc. supported the position of Cal-Tax.
5. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; looseleaf typewritten version, pp. 7-8. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall be published in the California Administrative Notice Register and be made available to...the courts." (Emphasis added.) Implementing this directive, this and other determinations are presently being mailed to the clerks of all state and federal courts in California.
6. Cal-Tax makes reference to an undated "Policy Statement", which was attached as Exhibit B to its Request. This Policy Statement was apparently not distributed with the challenged Letter to Assessors. There is, thus, no need to further discuss the Statement.

7. See California Constitution, article 13A, section 2, subdivision(a), which provides that county-assessed real property is to be assessed at the 1975-1976 assessment level, the "valuation rollback provision"--unless construction or change of ownership has occurred.
8. See ITT World Communications, Inc. v. City and County of San Francisco (1985) 37 Cal.3d 859, 210 Cal.Rptr. 226. This case interpreted Proposition 13 as providing that state-assessed property was not subject to the "valuation rollback provision", but would rather be annually valued by the Board.
9. 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986; Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-20--B-21; loose-leaf typewritten version, pp. 4-6.
10. Reply, p. 3.
11. Id.
12. 1986 OAL Determination No. 3, supra n. 9, Notice Register p. B-21; looseleaf typewritten version, p. 6.
13. The significant advantages of public participation in agency rulemaking are noted in Chamber of Commerce of United States v. OSHA (D.C.Cir.1980) 636 F.2d 464, 470-471, wherein a federal agency had issued an informal rule which disagreed with judicial interpretation of the underlying statute:

"The Assistant Secretary should not treat the procedural obligations under the APA as meaningless ritual. Parties affected by the proposed legislative rule are the obvious beneficiaries of proper procedures. Prior notice and an opportunity to comment permit them to voice their objections before the agency takes final action. Congress enacted 5 U.S.C. section 553 in part to "afford adequate safeguards to private interests." H.R. 1203, 79th Cong., 1st Sess. (Comm. Print June, 1945) (quoting S. Doc. 8, 77th Cong., 1st Sess. 103

(1941) (Final report of Att'y General's Comm. on Ad. Proc.)), reprinted in S. Doc. 248, 79th Cong., 2d Sess. 20 (1946) (official legislative history of the Administrative Procedure Act.) Given the lack of supervision over agency decisionmaking that can result from judicial deference and congressional inattention, see Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975), this protection, as a practical matter, may constitute an affected party's only defense mechanism.

An agency also must not forget, however, that it too has much to gain from the assistance of outside parties. Congress recognized that an agency's "knowledge is rarely complete, and it must learn the...viewpoints of these whom the regulation will affect...[Public] participation...in the rule-making process is essential in order to permit administrative agencies to inform themselves...." H.R. 1203, 79th Cong., 1st Sess. (Comm. Print June, 1945) (quoting S. Doc. 8, 77th Cong., 1st Sess. 103 (1941) (Final report of Att'y General's Comm. on Ad. Proc.)), reprinted in S. Doc. 248, 79th Cong., 2d Sess. 20 (1946). Comments from sources outside of the agency may shed light on specific information, additional policy considerations, weaknesses in the proposed regulation, and alternative means of achieving the same objectives. See National Petroleum Refiners Association v. FTC, 482 F.2d 672, 683 (D.C.Cir.1973), cert. denied, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974). By the same token, public scrutiny and participation before a legislative rule becomes effective can reduce the risk of factual errors, arbitrary actions, and unforeseen detrimental consequences. See Freedman, Summary Action by Administrative Agencies, 40 U.Chi.L.Rev. 1, 27-30 (1972).

Finally, and most important of all, highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action. See Hahn, Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation (pt. 1), 30 Ad.L.Rev. 467, 500-04 (1978). Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance,

improper influences, and ulterior motivation. Public participation in a legislative rule's formulation decreases the likelihood that opponents will attempt to sabotage the rule's implementation and enforcement. See Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, 118 U.Pa.L.Rev. 540, 541 (1970). See generally Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 & n. 19, 71 S.Ct. 624, 648-649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)."

14. (1978) 22 Cal. 3d 198, 149 Cal.Rptr. 1.
15. See California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 509, 131 Cal.Rptr. 744, 751 (APA's two primary goals are meaningful public participation and effective judicial review).
16. General Pipe Line Co. of California v. State Board of Equalization (1936) 5 Cal.2d 253.
17. Western Oil and Gas Association v. California State Board of Equalization (1985) 218 Cal.Rptr. 527, review granted, December 31, 1985.
18. 221 Cal.Rptr. 164 (Dec. 31, 1985).
19. "Underground regulations" refers to the enactments outlawed in Government Code §11347.5: agency rules which have been issued or enforced absent compliance with APA requirements.
20. We leave for another day resolution of the question of whether a formal Board regulation redefining "pipelines" would pass scrutiny under the "consistency" test of Government Code sections 11349 and 11349.1. We would at that time review the proposed regulation and the record of the

rulemaking proceeding as required by the APA. See Chamber of Commerce of United States v. OSHA (D.C.Cir.1980) 636 F.2d 464, 471.

21. In construing a statute, we may consider similar phrases in other statutes. See Goleta Valley Community Hospital v. State Department of Health Services (1983) 149 Cal.App.3d 1124, 1129, 197 Cal.Rptr. 294, 298.
22. Government Code section 11349(e).
23. As encompassing the pipe itself and nothing more.
24. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (points 1 and 3); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
25. See Government Code section 11346.
26. Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104; as cited in 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986; Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-34 and n. 14; looseleaf version, p. 7 and n. 14.
27. The cases cited by the Board in support of this argument all involve the principle of exhaustion of administrative remedies -- a principle which has no application here. Also, the proceedings of the county assessment appeals board, involved in two of the three cited cases, appear to have involved named parties and specific contested issues -- in sharp contrast to the Board's future oriented reinterpretation of "pipelines". The Board cannot exempt itself from Government

Code 11347.5 by characterizing all tax-related policies as quasi-judicial in nature.

28. See Board Minutes of May 20, 1982, attachment to comments of Chevron USA Inc.
29. Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
30. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
31. Reply, p. 5.
32. Id.
33. (1983) 149 Cal.App.3d 1129, 197 Cal.Rptr. 294.
34. Id., 197 Cal.Rptr. at 297.
35. The Board's reinterpretation of "pipelines" presents a notable contrast to the definition set out in Pipeline Co. v. State Board of Equalization (1936) 5 Cal.2d. 253, 256-257. In this connection, we note that under federal decisional law construing the federal APA, it has been held that an informal agency rule which disagrees with judicial interpretation of the underlying statute may be so significant that it must be formally adopted as regulation. Koch, Administrative Law and Practice (1985), section 3.25, p. 146, citing Chamber of Commerce of United States v. OSHA (D.C. Cir. 1980) 636 F.2d 464, 470. This federal holding is especially significant because--unlike the California APA--the federal APA exempts from formal rulemaking requirements two categories of purportedly "non-legislative" rules: "interpretive rules" and "policy statements". See 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003) California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-34 & n.15; looseleaf typewritten version, p.7 & n.15.

Thus, a federal court decision involving analogous circumstances which required an informal federal agency rule to be formally adopted is noteworthy persuasive authority in applying Government Code section 11347.5 to a challenged California state agency rule. If a particular type of rule was required to be formally adopted under the less demanding federal APA, a fortiori a comparable California state agency rule would generally be required by the more stringent state statute to be adopted pursuant to the California Administrative Procedure Act.

By contrast, given the broad scope of the "non-legislative" exemptions, federal court decisions holding that informal federal agency rules need not be formally adopted pursuant to the federal APA are of little value in applying Government Code section 11347.5.

We note that Alaska's APA appears to contain a definition of "regulation" comparable in scope to California's. See Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State of Alaska (1981) 628 P.2d 897, 904-905.

36. The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
- a. Rules relating only to the internal management of the state agency. Government Code section 11342(b).
 - b. Rules directed to a specifically named person or group of persons which do not apply generally throughout the state. Government Code section 11343(a)(3).
 - c. Rules that "establish[] or fix[] rates, prices or tariffs". Government Code section 11343(a)(1).
 - d. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. Government code section 11342(b).
 - e. Contractual provisions previously agreed to by the complaining party.

37. See 1986 OAL Determination No. 3 (State Board of Equalization, May 28, 1986; Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-26--B-27; looseleaf version, p. 15.
38. Id. See California Administrative Notice Register, p. B-27; looseleaf version, p. 16 which states:
- "....[A] 'legal ruling of counsel' has the following characteristics:
- (a) It is signed by a Board attorney;
 - (b) It is initially directed to a specific person and answers a specific legal question concerning tax liability in a particular factual context;
 - (c) It is summarized in the annotation volume of the Property Tax Law Guide and is labelled "C" for "staff correspondence."
 - (d) Copies with the original addressee's name and other identifying data deleted are made available upon request to other interested persons."
39. Reply, p. 1.
40. Government Code section 11347.5 is violated if the interpretations or reinterpretations are regulatory in nature.
41. Natural Resources Defense Council v. Arcata National Corporation (1976) 59 Cal.App.3d 959, 965, 131 Cal.Rptr. 172 (harmonize different statutes to give effect to all).
42. See Statutes of 1983, Chapter 1080, section 1, amending Government Code section 11342(b).